



Signed and Filed: October 29, 2008

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
JOHN A. and DANIELLE T. RYAN,) No. 05-32933DM
Debtors.) Chapter 11
NICKLOS CIOLINO, et al.,) Adversary Proceeding
Plaintiffs,) No. 05-3428DM
v.)
JOHN A. RYAN, et al.,)
Defendants.)
E. LYNN SCHOENMANN,)
Plaintiff-in-Intervention,)
v.)
LAWRENCE CHAZEN, LAWRENCE J. CHAZEN)
REVOCABLE TRUST, WILLIAM STEWART,)
CRAIG JUDY, PATRICIA JUDY, LAWRENCE)
CAVALLINI, KATHY CAVALLINI and)
NICKLOS CIOLINO, et al.,)
Defendants.)

MEMORANDUM DECISION REGARDING MOTION FOR SUMMARY JUDGMENT

Defendants Lawrence J. Chazen, individually and as trustee of
the Lawrence J. Chazen Revocable Trust (collectively "Chazen"),
move for summary judgment against Plaintiffs Nicklos Ciolino,
Charles Ciolino, Daniel Delorenzi, Robert Aguilar, and Stephen

1 Daniele (collectively the "Ciolino Parties") on their alleged
2 independent claim for conspiracy/aiding and abetting against
3 Chazen. Because there are no genuine issues of material fact in
4 dispute, and Chazen is entitled to summary judgment as a matter of
5 law, the Court hereby GRANTS Chazen's motion.

6 **I. FACTS¹**

7 This case has a long and contentious history. However, for
8 the purposes of this motion, the Court briefly recites only the
9 relevant facts. On January 28, 2005, the Ciolino Parties filed a
10 First Amended Complaint to Set Aside or Annul Fraudulent Transfers
11 and for Damages against several defendants, including Chazen, in
12 the Superior Court of the State of California, County of San
13 Mateo. The Ciolino Parties alleged that debtor John A. Ryan made
14 a number of fraudulent transfers of his assets to the other
15 defendants, and further asserted that all defendants, including
16 Chazen, conspired and/or aided and abetted in the wrongful conduct
17 to accomplish the transfers. After debtors John A. and Danielle
18 T. Ryan ("Debtors") filed their voluntary petition under Chapter
19 11² on September 7, 2005, the state court fraudulent transfer
20 action was removed to this Court on October 4, 2005, commencing
21 the instant adversary proceeding. The matter did not proceed
22 beyond initial disclosures, and Ms. E. Lynn Schoenmann was

23
24 ¹ The following discussion constitutes the court's findings
25 of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

26 ² Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
enacted and promulgated prior to the effective date of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, 119 Stat. 23.

1 appointed as Chapter 11 trustee ("Trustee") of the Debtors'
2 bankruptcy estate on February 14, 2006.

3 On September 9, 2007, pursuant to Rule 7024, the Trustee
4 filed a Motion and Complaint to Intervene in the adversary
5 proceeding brought by the Ciolino Parties to recover or avoid the
6 alleged fraudulent transfers by Debtors under section 544(b), and
7 Cal. Civ. Code §§ 3439.04(A), 3439.04(B), and 3439.05. The
8 Ciolino Parties were not named in the Trustee's moving papers.
9 This Court granted Trustee's motion on October 17, 2007.

10 After the parties initially stated they would maintain a
11 status quo while awaiting the result of another matter on appeal
12 from this Court to the Ninth Circuit, Chazen apparently changed
13 course and filed a Motion for Summary Judgment on August 19, 2008.
14 During certain discovery disputes, the Ciolino Parties maintained
15 they hold a claim, independent from Intervener-Plaintiff Trustee,
16 against Chazen for conspiracy/aiding and abetting of the
17 fraudulent transfers. In the motion, Chazen asserted that the
18 Ciolino Parties did not retain the conspiracy aspect of their
19 fraudulent transfer claim because: (1) California law does not
20 recognize conspiracy as an independent cause of action; and (2)
21 there was no evidence of a conspiracy between Chazen and the
22 Debtors. A hearing on Chazen's motion was set for September 16,
23 2008.

24 Trustee filed a Rule 7056(f) motion on September 2, 2008,
25 seeking additional discovery against Chazen and Debtor John Ryan,
26 which served as a timely opposition to Chazen's motion. This
27 Court granted Trustee's motion on September 12, 2008, and the
28 summary judgment hearing was rescheduled for December 19, 2008.

1 The Ciolino Parties did not file a timely opposition to
2 Chazen's motion. On September 24, 2008, counsel for the Ciolino
3 Parties filed a Declaration in Support of Joinder in Trustee's
4 56(f) Motion, for Leave to File Opposition to Chazen's Motion for
5 Summary Judgment, and Request for Hearing on Chazen's Motion for
6 Summary Judgment on December 19, 2008. Chazen filed a Response to
7 the declaration on September 25, 2008. Upon consideration of the
8 pleadings filed by both parties, this Court denied the Ciolino
9 Parties' counsel's declaration, and took under advisement whether
10 as a matter of law Chazen was entitled to summary judgment on the
11 Ciolino Parties's claim for conspiracy/aiding and abetting.

12 II. ISSUE

13 Do the Ciolino Parties have an independent claim for
14 conspiracy/aiding and abetting against Chazen?

15 III. DISCUSSION

16 A. Summary Judgment Standard

17 Summary judgment is properly granted when there is no genuine
18 issue of material fact and the moving party is entitled to
19 judgment as a matter of law. Rule 7056(c).

20 B. Violation Of California's Uniform Fraudulent Transfer 21 Act Is Tortious Conduct Which Supports A Claim For Conspiracy or Aiding And Abetting.

22 Some jurisdictions hold that a violation of the fraudulent
23 transfer law does not constitute an independent tort. Therefore,
24 if civil conspiracy under state law requires an independent tort,
25 then a conspiracy claim cannot be maintained in those
26 jurisdictions where a violation of the fraudulent transfer laws
27 does not constitute a tort. However, California courts have held
28 that a fraudulent transfer is tortious conduct, and an act for

1 which fellow conspirators can be held liable in connection
2 therewith. Filip v. Bucurenciu, 129 Cal. App. 4th 825, 837 (3d.
3 Dist. 2005)("In fraudulently transferring property, tortious
4 conduct occurred."); See In re B.L. Jennings, Inc., 373 B.R. 742
5 (Bankr. M.D. Fla. 2007)(violation of California's Uniform
6 Fraudulent Transfer Act is tortious conduct that will support a
7 conspiracy claim, relying on Filip decision).

8 Here, in their state court action, the Ciolino Parties pled
9 "Conspiracy/Aiding and Abetting." California courts recognize
10 that conspiracy and aiding and abetting are closely allied forms
11 of liability. Janken v. GM Hughes Elec.s, 46 Cal. App. 4th 55, 78
12 (2d. Dist. 1996)("A conspiracy generally requires agreement plus
13 an overt act causing damage. Aiding and abetting requires not
14 agreement, but simply assistance. The common basis for liability
15 for both conspiracy and aiding and abetting, however, is concerted
16 wrongful action."). Therefore, the Court treats the Ciolino
17 Parties' claim for conspiracy/aiding and abetting as one in the
18 same.

19 **C. California Law Does Not Recognize A Cause Of Action**
20 **For Civil Conspiracy Or Aiding and Abetting.**

21 Under California law, there is no separate and distinct tort
22 cause of action for civil conspiracy. Allied Equip. Corp. v.
23 Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-511 (1994). See
24 Filip at 837 (under California law, civil conspiracy is not a
25 cause of action but rather a theory of joint liability imposed on
26 persons who, although not committing a tort themselves, share with
27 the immediate tortfeasors a common plan or design in its
28 perpetration); and see Wyatt v. Union Mortgage Co., 24 Cal. 3d

1 773, 784 (1979)(holding same).

2 In other words, the gravamen or gist of the action for a
3 civil conspiracy is not the conspiracy itself, but the underlying
4 tort which, absent the conspiracy, would give rise to a right of
5 action. Therefore, without the existence of an underlying tort, a
6 claim for conspiracy or aiding and abetting cannot stand.

7 **D. Because Trustee Succeeded To The Underlying Tort Of**
8 **Fraudulent Transfer, The Ciolino Parties Have No**
9 **Independent Claim for Conspiracy/Aiding And Abetting.**

10 Where a trustee has been appointed, she or he assumes
11 complete control of litigation concerning the bankruptcy estate.
12 Meyer v. Fleming, 327 U.S. 161, 165-166 (1946)(trustee has the
13 authority and discretion to initiate an action, pursue an action
14 previously initiated, intervene, settle or dismiss).

15 Section 544³ commonly referred to as the "strong arm clause,"
16 allows a trustee to prosecute fraudulent transfer actions under
17 state law that could have been prosecuted by one of the debtor's
18 actual unsecured creditors.⁴ Although the Ciolino Parties are
19 presumably the creditors with grounds to avoid the alleged
20 fraudulent transfers against all defendants under California's
21 UFTA, the commencement of the bankruptcy case gave the Trustee the
22 right under section 544(b) to pursue that action to the exclusion
23 of all creditors. See In re Berg, 376 B.R. 303, 311 (Bankr. D.

24 ³ Section 544(b)(1) provides in relevant part, ". . .[T]he
25 trustee may avoid any transfer of an interest of the debtor in
26 property . . . that is voidable under applicable law by a creditor
27 holding an unsecured claim."

28 ⁴ To avoid the transfer from Debtors to the several
defendants, Trustee relies on California's Uniform Fraudulent
Transfer Act ("UFTA"), the same statute invoked by the Ciolino
Parties in their state court action.

1 Kan. 2007)(citing In re Integrated Agri, Inc., 313 B.R. 419, 427
2 (Bankr. C.D. Ill. 2004); and see Matter of Leonard, 125 F.3d 543
3 (7th Cir. 1997)(creditor who filed a prepetition UFTA suit against
4 defendant who then filed Chapter 7, which suit was removed to
5 bankruptcy court by the Chapter 7 trustee, had no continuing
6 rights or interest in the suit).

7 Therefore, once Debtors filed their petition, the Trustee
8 stepped into the shoes of the Ciolino Parties and was given the
9 exclusive power to avoid the allegedly fraudulent transfers under
10 California law against the defendants.

11 Even though the Ciolino Parties are no longer asserting the
12 fraudulent transfer action, they continue to maintain that they
13 have an independent claim for conspiracy/aiding and abetting.
14 They do not. Because the Trustee succeeded to the cause of action
15 to avoid the allegedly fraudulent transfers under section 544(b)
16 and Cal. Civ. Code § 3439 et. seq., there is no underlying tort to
17 support the conspiracy/aiding and abetting claim. Without the
18 underlying tort of fraudulent transfer, under California law the
19 Ciolino Parties have no independent claim against defendant Chazen
20 for a conspiracy to commit, or aid and abet in, the tortious act
21 of fraudulent transfer. See Filip supra.

22 Accordingly, as a matter of law, the Ciolino Parties have no
23 independent claim for conspiracy or aiding and abetting against
24 defendant Chazen, and Chazen is entitled to summary judgment.⁵

26 ⁵ Since Trustee is the proper party to avoid the allegedly
27 fraudulent transfers, it would appear to follow that she too is
28 the proper party to assert the related claim for conspiracy/aiding
and abetting. Trustee has not alleged a claim for conspiracy or
aiding and abetting. However, even if she had, Trustee lacks

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IV. CONCLUSION

Therefore, based on the foregoing reasons, the Court GRANTS Chazen's Motion for Summary Judgment. A separate Order to that effect is being issued concurrently with this Memorandum Decision.

END OF MEMORANDUM

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standing to assert such a claim. See In re Hamilton Taft & Co., 176 B.R. 895, 902 (Bankr. N.D. Cal. 1995) aff'd on other grounds, 114 F.3d 991 (9th Cir. 1997)(trustee is not authorized to pursue every action that creditors of the debtor might pursue, such as recover civil damages from those who conspire to transfer debtor's property to hinder, delay, or defraud creditor; section 544(b) permits trustee only to avoid a fraudulent transfer, not to assert a claim for aiding and abetting a fraudulent transfer.

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